

NINA R. B. LEVINSON
and
CLARE R. SIGFRID

IBLA 70-49

Decided February 2, 1971

Color or Claim of Title: Generally

An application to purchase public land under the Color of Title Act is properly rejected when the applicant is unable to show possession under some claim or color of title derived from some source other than the United States and where the claim was initiated while the land was withdrawn as part of a national forest.

Surveys of the Public Lands: Generally

Surveys of the United States, after acceptance, are presumed to be correct, and will not be disturbed, except upon clear proof that they are fraudulent or grossly erroneous. Where a public land applicant challenges the validity of a dependent resurvey he must establish by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey in order to sustain his position.

IBLA 70-49 :

Colorado 4638

NINA R. B. LEVINSON
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: Color of title appli-
cation rejected

: Affirmed

DECISION

Nina R. B. Levinson and Clare L. R. Sigfrid appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated April 4, 1969, which affirmed a decision of the Bureau's Denver, Colorado, land office, rejecting appellants' class 1 color of title application.

On August 23, 1968, appellants filed a class 1 application (Colorado 4636) pursuant to the Color of Title Act of December 22, 1928, as amended, 43 U.S.C. § 1068 (1964), to acquire the SE 1/4 NE 1/4 sec. 27, T. 12 N., R. 82 W., 6th P.M., Colorado. Appellants asserted in their application and appeals that the 40 acre tract described as the SE 1/4 NE 1/4 sec. 27, T. 12 N., R. 82 W., 6th P.M., is in fact the same 40 acre tract described as the SW 1/4 NW 1/4 sec. 26, in the same township, which was originally conveyed to their father, Cooke Rhea, June 6, 1924, by patent No. 939550. Appellants inherited the SW 1/4 NW 1/4 from their father in 1933, and assert that they have continuously occupied the tract, adding improvements of approximately 1 mile of fence of \$ 500 value.

Appellants first learned there was a conflict over the land they had occupied as the SW 1/4 NW 1/4 sec. 26, in July of 1957 when a dependent resurvey was conducted by the Bureau of Land Management. Since then they have consistently maintained that the confusion in the legal description of the tract they have applied for is a direct result of error in the dependent resurvey. They submit that discrepancies between the resurvey and the original survey have resulted in the mislocation of their patented 40 acre tract causing a westward shift of the tract from its record position into the Routt National Forest.

In a decision of December 18, 1968, the Denver land office rejected appellants' application stating the applicants had failed to meet two basic requirements for a color of title application: (1)

that possession must be based on a claim derived from a source other than the United States and evidenced by a written instrument purporting to convey title, and (2) that the SE 1/4 NE 1/4 sec. 27 was withdrawn in 1904 for a forest reserve and is still withdrawn for national forest purposes and a color of title application cannot be initiated while the land applied for is withdrawn.

The Office of Appeals and Hearings affirmed the land office rulings as to these two basic deficiencies in this color of title application. The decision also emphasized appellants had not presented substantial or convincing evidence that there is any gross error or fraud in the 1882 survey or the 1957 resurvey or that the SE 1/4 NE 1/4 sec. 27 became the land patented to their ancestor. It concluded appellants had not refuted the fact that the 1957 resurvey represents the restoration of the 1882 survey corners and lines substantially in agreement with the original 1882 survey.

Upon a complete review of the circumstances of this case we find appellants have failed to establish a proper basis for the relief they seek under the Color of Title Act, supra. An application under the Color of Title Act, supra, is not a proper vehicle for appellants to quiet title to lands they have occupied pursuant to a patent issued from the United States. The basic premise upon which appellants rely is that the resurvey of 1957 is erroneous and they already hold good title to the applied for lands as described and conveyed within the four corners of the patent to their father. Their argument against the resurvey is inconsistent with the filing of a claim under the Color of Title Act, supra. If appellants had successfully proven gross error in the resurvey to the point of establishing that their father did acquire title to all of the land they have been occupying as the SW 1/4 NW 1/4 sec. 26, then the United States would have already divested itself of all right, title and interest in this land. Consequently, a color of title application could not properly be maintained for land in which the United States would have no interest.

Departmental decisions hold that color of title within the meaning of the act cannot be derived from a patent, but must originate in a source other than the United States. Sylvan A. Hart, A-30832 (December 1, 1967); Bernard J. and Myrle A. Gaffney, A-30327 (October 28, 1965); 1/ Ingrid T. Allen, A-28638 (May 24, 1962). Color

1/ A suit for judicial review of the Gaffney case resulted in a stipulated dismissal without prejudice, January 17, 1969. Bernard J. Gaffney and Myrle A. Gaffney v. Stewart Udall, Civil No. 3-66-22. (D. Minn.)

of title by definition is based upon a writing which upon its face professes to pass title but which does not, either through want of title in the grantor or a defective mode of conveyance. See BLACK'S LAW DICTIONARY 332 (4th ed.rev. 1968). A patent from the United States conveys title to all the land described in the patent. It is a well established principle that a patent in which land is described in accordance with the plat of survey conveys all the land within the limits so specified. Wildman v. Montgomery, 20 L.D. 230 (1895).

In the instant case patent No. 939550, issued to appellants' father on June 6, 1924, did in fact vest title to the SW 1/4 NW 1/4 sec. 26, in the patentee for that tract as described in accordance with the official plat of survey. That document cannot now serve as a source of color of title for additional lands that appellants may have occupied outside the limits of the land described as the SW 1/4 NW 1/4 sec. 26. Under similar circumstances the Department has specifically held that a claim or color of title cannot run to land outside the area described in the deed on which the claim or color of title is based, even though the claimant and his predecessors in title believed in good faith that it was covered by the description in the conveyance. Storm Brothers, A-29023 (October 8, 1962).

The Department's regulations implementing the Color of Title Act, supra, define a class 1 claim or color of title as one which has been held in good faith and in peaceful adverse possession by a claimant, his ancestors, or grantors, under claim or color of title for more than 20 years, on which valuable improvements have been placed, or on which some part of the land has been reduced to cultivation. A claim is not held in peaceful adverse possession where it was initiated while the land was withdrawn or reserved for Federal purposes. 43 CFR 2540.0-5, 35 F. R. 9592 (formerly 43 CFR 2214.1-1(b)).

Appellants have failed to show that they have held possession of the SE 1/4 NE 1/4 sec. 27 under a proper claim or color of title initiated prior to the inclusion of that tract in a national forest. For reasons hereinafter more fully discussed, their case against the dependent resurvey of 1957 is insufficient to negate the fact that the land is in the Routt National Forest. The SE 1/4 NE 1/4 of sec. 27, T. 12 N., R. 82 W., 6th P.M., Colorado, was included within the boundaries of the Park Range Forest Reserve by Presidential Proclamation of June 12, 1905; changed to the Hayden National Forest July 1, 1908, by Executive Order No. 839 of June 25, 1908; and transferred to the Routt National Forest by Presidential Proclamation No. 1888 of August 2, 1929. Even if there were no

other objections to this application, appellants cannot establish the fact of peaceful adverse possession as required by the law and the regulations. As the Bureau correctly pointed out a color of title application cannot be approved or allowed for land which was reserved and set apart as a public reservation of forest land before the initiation of the claims described in the application. Lester J. Hamel, 74 I.D. 125 (1967), and cases cited therein.

While the foregoing discussion is dispositive of this matter, the crux of appellants case rests on their challenge of the dependent resurvey of T. 12 N., R. 82 W., 6th P.M., Colorado, as executed by Clyde Duren Jr., in July of 1957, and accepted by the Bureau October 7, 1958. Here, we must first point out that where appellants base their claim on a contention that a government survey is incorrect they have the burden of proving wherein the survey is erroneous. It has long been established by the Department that surveys of the United States, after acceptance, are presumed to be correct, and will not be disturbed, except upon clear proof that they are fraudulent or grossly erroneous. George Whitaker, 32 L.D. 329 (1903); State of Louisiana, 60 I.D. 129 (1948); Ralph E. May, C. S. McGhee, A-29014 (January 30, 1962). Appellants have not met this burden. They have completely failed to establish gross error or fraud in the Duren resurvey. They have not shown by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the original lines of survey for T. 12 N., R. 82 W., 6th P.M., Colorado.

The Duren resurvey of T. 12 N., R. 82 W., was initiated at the request of the Forest Service, U. S. Department of Agriculture. It was conducted in accordance with the established rules of survey as set forth in the U. S. DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, MANUAL OF INSTRUCTIONS FOR THE SURVEYING OF PUBLIC LANDS OF THE UNITED STATES, (1947), hereinafter referred to as the "Bureau's Survey Manual." The purpose of a dependent resurvey as specified in sec. 400 of the Bureau's Survey Manual is:

... to accomplish a restoration of what purports to be the original conditions according to the record, based, first upon identified existing corners of the original survey and other recognized and acceptable points of control, and second, upon the restoration of missing corners by proportionate measurement in harmony with the record of the original survey.

In this case it appears from the record that the surveyor followed procedures consistent with accepted surveying practice in order to achieve this purpose.

The resurvey was not intended to change the boundaries of privately owned lands described and patented according to the original survey of T. 12 N., R. 82 W., as executed by Henry G. Gilbert in 1882. The Department has continually adhered to the proposition that the Federal Government is without power to affect, by means of a second survey, the property rights acquired under an official survey. O. R. Williams, 60 I.D. 301, 303 (1949); Nelson D. Jay, A-27468 (December 4, 1957); United States v. Sidney M. and Ester M. Heyser, 75 I.D. 14, 18 (1968).

We have thoroughly reviewed all the evidence presented by appellants in conjunction with the official records of the plats of survey and the corresponding field notes having a direct bearing on this case. ^{2/} These records do not support appellants' interpretation of the surveys. Appellants' rights to the SW 1/4 NW 1/4 sec. 26, T. 12 N., R. 82 W., 6th P.M., Colorado, as described and conveyed in the patent to their father according to the official plat of survey have not been affected by the dependent resurvey in question.

The field notes of the Duren resurvey, 309 Colorado Fieldnotes, p. 441, indicate that Duren first began his resurvey by retracing the boundaries of the original Gilbert survey of T. 12 N., R. 82 W., in an effort to identify any existent corners. Although he was unable to locate the original section corners he did successfully identify and recover an original monument on the south boundary of the survey at the quarter section corner of secs. 2 and 35, Ts. 11 N., and 12 N., R. 82 W., 6th P.M. He retraced the Colorado-Wyoming state line on the north boundary of T. 12 N., R. 82 W., identifying mileposts 131, 133 and 134 from the original survey of the state line of A. V. Richards. He completed the resurvey of the south boundary

^{2/} Official records of field notes and plats of survey were examined for survey of the south boundary and subdivision of T. 12 N., R. 82 W., 6th P.M., Colorado, Henry G. Gilbert, 1882; Dependent Resurvey of the west boundary of 12 N., R. 81 W., 6th P.M., Colorado, John M. Tufts, 1938; Survey of the Colorado-Wyoming State boundary, A. V. Richards, 1872; and Dependent Resurvey in T. 12 N., R. 82 W., 6th P.M., Colorado, Clyde Duren, Jr., 1957.

of T. 12 N., R. 82 W., reestablishing the section corners at record courses and distances from the identified quarter section corner of secs. 2 and 35. He reestablished the latitudinal positions of all of the remaining corners in the township based upon proportionate measurement between the dependently resurveyed south boundary of the township and the Colorado-Wyoming state line. The longitudinal positions of these same corners were determined by record distances from the resurveyed east boundary of the township. It is to be noted that the beginning point of the measurements of all the longitudinal positions of these corners was the common range line between T. 12 N., Rs. 81 and 82 W., where Duren had located and remarked the monuments for the common boundary as originally set by John M. Tufts in his dependent resurvey of T. 12 N., R. 81 W., in 1938.

By using this accepted method working from these various fixed points of reference Duren was able to reestablish the position of the section corners in almost the exact position of the original survey corners.

The subdivision of the fractional township was completed in the normal order prescribed in the Bureau's Survey Manual in secs. 175-182. Beginning with sec. 36 at the southeast corner of the township, Duren worked from south to north reestablishing the position of each section in order, closing on the Colorado-Wyoming state line. He resurveyed the adjacent sections, working from south to north, also intersecting the state line. His closing corner positions on the state line were determined in the regular manner from the recognized mileposts of the original boundary survey.

Examination of the plats of survey in light of information of record confirms the proper relative position of the Duren resurvey. The closing corners on the north boundary of T. 12 N., R. 82 W., appear on the original Gilbert Survey along the Colorado-Wyoming state line in sec. 22 at a point 29.80 chs. (chains) east of the 133rd milepost, in sec. 23 at a point 29.65 chs. east of the 132nd milepost, and in sec. 24 at a point 30.10 chs. east of the 131st milepost. As the Bureau of Land Management has previously indicated, these same closing corners are established on the state line on the Duren resurvey at distances "substantially in agreement with those shown on the official plat of the original survey." On the Duren resurvey these same closing corners appear in sec. 22 at a point 29.64 chs. east of the 133rd milepost, in sec. 23 at a point 29.49 chs. east of the reset 132nd milepost, and in sec. 24 at a point 29.87 chs. east of the 131st milepost.

In comparing these critical measurements there is little difference between the original and the resurvey closing distances, no more than .23 chs. (15.18 ft.) in any one measurement. Certainly, such a slight variance could not be interpreted as gross error, nor could it possibly have resulted in a westward shift of appellants' patented tract over a distance of a quarter of a mile. In addition, a check against the plat of the Tufts' resurvey of the adjacent township in 12 N., R. 81 W., verifies the proper east-west position of the Duren resurvey. The closing corner of 12 N., R. 81 W., which is also the northeast corner of 12 N., R. 82 W., appears on the Colorado-Wyoming State line at a point 29.91 chs. east of the 131st milepost. This favorably compares to the same measurement by Duren for the corner common to both townships at a point 29.87 chs. east of the 131st milepost. The difference between the two surveyors' measurements is only .04 chs., less than a distance of 3 feet.

Turning next to appellants' specific charges of discrepancies between the surveys, we note they refer to the position of the Continental Divide on the original survey of the Colorado-Wyoming boundary, by A. V. Richards in 1872. They maintain the divide appears on the Richards' survey approximately 3 1/2 miles east of the 133rd milepost. In their own comparison of the Duren resurvey they conclude that the 133rd milepost "is very considerably further east of the top of the Continental Divide than 3 1/2 miles." First, these are merely general statements of appellants' own approximations of distances which are unsupported by on-the-ground measurements of a qualified surveyor. Appellants' theoretical comparisons will not control over more precise measurements taken from other fixed points of reference as set forth on the official plats of survey. Second, the Continental Divide has no proper relation to the patented tract on the surveys in question. It was not involved in the area of these surveys and was not used as a reference point for any location of boundaries in T. 12 N., R. 82 W. Therefore, there are no official measurements on the plats of survey or in the field notes that could be compared or verified from the 133rd milepost to the Continental Divide.

Appellants also point to the location of the Town of Pearl, Colorado, stating "The 1957 resurvey places the Town of Pearl in Range 82." The significance of the alleged position of Pearl is not entirely clear from appellants' brief. However, they have apparently attempted to correlate the alleged change in position of their patented land to the location of the Town of Pearl on general reference maps of the State of Colorado and on a private

survey of Pearl. ^{3/} Their argument is both ineffective and confusing. The Town of Pearl does not appear within T. 12 N., R. 82 W., on the plat of resurvey. Appellants have apparently misconstrued the location of a reference on the plat to U.S.C. and G.S. triangulation station "Pearl", (S 63 degrees 06'52"E, 33.71 chs.). This reference places the triangulation station of Pearl in T. 12 N., R. 81 W., 33.71 chains from the corners of sec. 25 and 24 on the east boundary of T. 12 N., R. 82 W. This fact is borne out from an examination of the surveyor's field notes p. 442 where he expressly states:

The direction of all lines were determined by both the transit and solar methods, with the initial azimuth obtained from the U.S.C. & G.S. second order triangulation station "Pearl", located in the NW 1/4 of section 30, T. 12 N., R. 81 W. (Emphasis added.)

It is a well settled principle that lands are granted according to the official government survey. The plat, itself, with all its notes, lines, descriptions, and landmarks, becomes as much a part of the grant or deed by which they were conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself. Cragin v. Powell, 128 U.S. 691 (1888). Also see Alaska United Gold Mining Co. et al. v. Cincinnati-Alaska Mining Co. et al., 45 L.D. 330 (1916), and cases cited therein. Therefore, in order to determine the limits of the area passed under a patent it is proper to look to the official plats of survey to determine the true location of the patented land. The alleged location of that land or any adjacent landmark on unofficial sources such as these reference maps or a private survey cannot affect its true location on the ground as depicted in the official government survey.

^{3/} Appellants have submitted copies of maps of parts of the State of Colorado including an unidentified map of Nell's Colorado of 1887, a General Land Office map of the State of Colorado of 1905, and a map of the Hayden National Forest, Forest Service, U.S.D.A., 1926. They also submit a plan of the Town of Pearl, Larimer County, Colorado, prepared by J. Phelps Pim, Mining Engineer, December 1900.

Appellants refer to the location of "Beaver Creek" which they state crosses the tract they have occupied from the southwest corner to the northeast corner and appears in the same location on the original Gilbert survey. A stream does appear to cross the SW 1/4 NW 1/4 sec. 26 on the Gilbert survey plat. The same stream appears to cross from the SE 1/4 NE 1/4 of sec. 27 continuing into the SW 1/4 NW 1/4. This topographical feature is not specifically identified in Gilbert's field notes as "Beaver Creek." ^{4/} If appellants had occupied land outside the area of their patent into the SE 1/4 NE 1/4 of sec. 27, the stream would also cross the total area of the occupied land in the same relative position, running in a direction from the southwest to the northeast.

The omission of the stream on the resurvey, by itself, does not necessarily prove appellants' theory of the case. The records indicate the two surveys were conducted at different times of the year (the original survey in February, the resurvey in July). It would not be unusual for a stream to dry up in the summer months. Accordingly, there might not be a topographical reference on a survey to a stream during that season of the year. Going a step further, this one omission does not prove the resurvey to be grossly erroneous or fraudulent. This is a reference to an item of topography which would not be controlling in this matter in the face of conflicting measurements of courses and distances from fixed monuments. It has long been accepted by the Department that items of topography in the interior of sections are based upon estimates of the surveyor rather than upon actual measurements, and represent only an approximation of the actual positions of natural monuments and are not to prevail over courses and distances. J. M. Beard (On Rehearing), 52 I.D. 451 (1928). While the absence of this one topographical reference is a point well taken, the clear preponderance of the evidence supports the validity of the resurvey.

^{4/} Gilbert refers to crossing a stream, 3 links wide, course N.E., at a point 45.20 chs. from the corners of secs. 26, 27, 34, 35, while going north between secs. 26 and 27 in his field notes, 156 Colorado Fieldnotes, p. 368.

With respect to appellants' request for a hearing, there is no requirement that a hearing be held prior to an adjudication by the Department of an application under the Color of Title Act, supra. Appellants have had ample opportunity to submit evidence they deemed pertinent to their case and have offered nothing to contradict the facts upon which the Bureau of Land Management determined this matter. There being no apparent justification for a hearing the request is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision of the Bureau of Land Management is affirmed.

Francis E. Mayhue, Member

I concur:

Martin Ritvo, Member

Joan B. Thompson, Alternate Member

